

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants:
Jay S. Walker, Daniel E. Tedesco,
Magdalena Mik

Application No.: 09/221,099

Filed: December 28, 1998

For: **PRE-SALE DATA BROADCAST
SYSTEM AND METHOD**

)
) Group Art Unit: 3621

)
) Examiner: P. Elisca

)
) **APPEAL BRIEF**

)
) Attorney Docket No. 98-112

)
) Customer No. 22927

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Dated: February 17, 2004 By: *V. S. Leliever*

Veronika S. Leliever

**BOARD OF PATENT APPEALS
AND INTERFERENCES**

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Appellants hereby appeal to the Board of Patent Appeals and Interferences from the
decision of the Examiner in the Final Office Action mailed January 22, 2003 (Paper No. 21),
rejecting claims 17 - 26, 80, 86 and 87.

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GROUP 3600

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REAL PARTY IN INTEREST

The present application is assigned to Walker Digital, LLC, 1177 High Ridge Road, Stamford, CT 06905.

RELATED APPEALS AND INTERFERENCES

Appellants are not aware of any appeals which might be considered to directly affect, be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 17 - 26, 80, 86 and 87 are pending in the present application and are being appealed.

All claims stand rejected under 35 U.S.C. § 103(a) as being obvious in light of a combination of:

- WO 97/08638 to Eraser;
- U.S. Patent No. 5,845,259 to West; and
- U.S. Patent No. 5,832,458 to Jones.

STATUS OF AMENDMENTS

No amendments were filed subsequent to final rejection.

SUMMARY OF INVENTION

In general, the presently claimed embodiments permit manufacturers to market products directly to consumers at the time of purchase. Prior to completing the sale of an original product at a POS terminal, one or more manufacturers can offer comparable substitute products to a customer during that sale. As such, manufacturers can enhance their marketing efforts. [Present Application, Summary of the Invention, Page 3, lines13 - 17]

In one embodiment of the present invention, the method for promoting the sale of substitute products includes receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal; determining a substitute product to be offered to the consumer during a transaction session; and offering the substitute product to the consumer before the transaction session terminates. [Present Application, Summary of the Invention, Page 3, lines18 - 22]

ISSUES

Whether all pending claims are obvious in light of a combination of Fraser, West and Jones.

GROUPING OF CLAIMS

All claims stand and fall together.

ARGUMENT

Summary of Argument

For two primary reasons, the Examiner has not made a prima facie case of obviousness of any claim.

First, the references under any reasonable interpretation completely fail to suggest several limitations that are recited in all independent claims. Among other failings, the references completely lack any hint of:

transmitting transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer

Second, the Examiner's entire obviousness case is essentially a conclusory analysis, without any teaching in the prior art for the proposed modifications and combinations.

Accordingly, the rejections are inappropriate and Appellants respectfully request that the rejections be reversed.

Form of this Appeal Brief

In the arguments herein, limitations of the claims are indicated in *italics*, and the references of record are indicated by underlining.

In separate arguments of patentability of different Groups, Appellants have, where possible, referred to prior arguments to avoid undue repetition.

In the arguments below, Appellants refer to:

Appellants' Response (Amendment and Response mailed September 9, 2002); and
the "Office Action" (Final Office Action mailed January 22, 2003).

1. The Independent Claims are Patentable

As discussed below, the rejection of the claims is flawed because the Examiner has not made a prima facie case of obviousness of any independent claim. The Examiner has not shown all limitations of any claim to be disclosed or suggested by the references. The rejection is also based on improper combinations and modifications of the references without adequate motivation in the prior art for making the proposed combinations and modifications.

Claims 17, 80, 86 and 87 are independent. Claim 17 is a method claim, claim 80 is a corresponding means-plus-function claim, claim 86 is a corresponding claim directed to computer executable software code stored on a computer readable medium, and claim 87 is a corresponding claim directed to a computer readable medium having computer executable software code stored thereon.

2. Limitations of the Independent Claims

Every independent claim generally recites the following limitation:

transmitting transaction data [regarding an original product presented for purchase by a consumer at a point of sale terminal] to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer

and also recites

offering (or transmitting an offer of) said substitute product to said consumer before the transaction session terminates

3. Advantages of the Independent Claims

The embodiments of the independent claims provide several advantages not even recognized, much less disclosed or suggested, by the prior art of record, either alone or in combination. These advantages render the claimed subject matter nonobvious over the cited art.

In general, the presently claimed embodiments permit one or more manufacturers to offer substitute products to a customer during a time when the customer is already purchasing something.

Since such customers have already indicated their readiness to purchase a product, the manufacturers are assured that their marketing efforts have an increased chance of success, especially if the substitute product is selected appropriately. As such, the presently claimed embodiments provide manufacturers a greater opportunity to compete with other manufacturers at retail locations.

By directly marketing to customers at the time of purchase, but prior to consummation of the purchase, manufacturers are able to market directly to customers at a time when the customer is literally making a purchase. This greatly enhances the marketing efforts by making the offer to a customer known to have certain needs.

A great many more advantageous and diverse uses of the claimed invention, both explicit and implicit in the present Application, are possible and would be apparent to those of skill in the art based on the Appellants' disclosure.

4. No Prima Facie Showing of Unpatentability of the Independent Claims

Several limitations are not disclosed or suggested by the references of record. Accordingly, the Examiner has not presented a prima facie case of obviousness of any independent claim.

Applicable Law

The Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992). To reject claims in an application under section 103, an examiner must show an un rebutted *prima facie* case of obviousness. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). If examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

The factual predicates underlying an obviousness determination include the scope and content of the prior art, the differences between the prior art and the claimed invention, and the level of ordinary skill in the art. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). The secondary considerations are also essential components of the obviousness determination. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998).

In order to rely on a reference as a basis for rejection of the applicant's invention, the reference must either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned. *In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992).

When a rejection is based on a combination of references, the Examiner can satisfy the prima facie burden only by showing some objective teaching leading to the purported combination of references. *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992). Lacking a motivation to combine references, there is no prima facie case of obviousness. *In re Rouffet*, 149 F.3d 1350, 1358 (Fed. Cir. 1998).

Finally, during examination, claims are given their broadest reasonable interpretation consistent with the specification. *In re Hyatt*, 211 F.3d 1367 (Fed. Cir. 2000). The "PTO applies to verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in applicant's specification." *In re Morris*, 127 F.3d 1048, 1054-55 (Fed. Cir. 1997).

4.1. No showing that the references suggest *transmitting transaction data [regarding an original product presented for purchase by a consumer at a point of sale terminal] to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer*

The Examiner incorrectly asserts that this limitation is suggested by Eraser (Office Action, pages 2 - 3). In fact, none of the references suggest this limitation. Specifically, no reference discloses:

transmitting transaction data [regarding an original product presented for purchase by a consumer at a point of sale terminal] to a remote server of a manufacturer

much less that

this data is transmitted during a transaction session

much less that

this data is transmitted to the manufacturer for determination of a possible substitute product to be offered to said consumer

No reference even addresses the ability of a manufacturer to determine a possible substitute product to be offered to a consumer during a transaction session.

Eraser discloses a price comparison system intended to address the concerns of a single retailer. Eraser does not involve any third parties at all, much less a remote server of a manufacturer. Accordingly, Eraser does not suggest the limitation above.

Specifically, Eraser is concerned with allowing a retailer to advertise to its customers (e.g., Fraser, page 1, lines 20 - 21) and allowing the retailer to choose which particular merchandise it will promote (e.g., Fraser, page 3, lines 12 - 15; page 4, lines 10 - 12; page 6, line 19 - page 7, line 4; page 8, line 19 - page 9, line 10; page 9, lines 14 - 19). For example, a supermarket could promote its own "house brand" of a product over a product of third party manufacturer. Eraser, page 3, lines 12 - 15.

There is no hint or suggestion in Eraser that a **manufacturer** could or should be benefited in any way, much less of allowing a manufacturer to market substitute products to customers during a sales transaction. For example, while in Eraser the retailer judges two products as

identical for purposes of recommending a substitution, in the present invention such determination may be made by one or more remote manufacturers. In Eraser there is no hint or suggestion of providing manufacturers with a greater opportunity to compete with other manufacturers at retail locations. Similarly, in Eraser there is no hint or suggestion of a manufacturer determining that it would be more profitable if the customer were to purchase the manufacturer's product rather than a competitor's product.

In fact, Eraser teaches away from the present invention by suggesting that the system of Eraser allows a retailer to promote its own brand over those of manufacturers. Eraser, page 3, lines 12 - 15. Clearly, this teaches away from the present invention, which aids manufacturers by allowing a manufacturer to market directly to customers during a sales transaction. Specification, page 5, lines 1 - 2.

Thus, the Examiner has not shown that the references, alone or in combination, disclose or suggest this limitation. The rejection fails for at least this reason.

4.2. No showing of a proper motivation to combine the references

Even if combined, the references still do not yield the advantageous limitations discussed above in Sections 4.1.

Moreover, the Examiner simply has not shown a motivation in the prior art of record to modify or combine the references in the manner proposed by the Examiner, or in any other manner that renders the claims obvious.

Applicable Law

Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. In re Fine, 5 USPQ2d 1596 (Fed. Cir. 1988); In re Jones, 21 USPQ2d 1941 (Fed. Cir. 1992). Furthermore, **particular findings must be made** as to the reason the skilled artisan, with no knowledge of the claimed invention, would have

selected these components for combination in the manner claimed. *In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000) (emphasis added).

A finding of obviousness requires that the art contain something to suggest the desirability of the proposed combination. *In re Grabiak*, 769 F.2d 729, 732 (Fed. Cir. 1985). **In the absence of such a showing**, there is inadequate support for the position that the proposed modification would *prima facie* have been obvious. *Id.* The absence of such a suggestion to combine is dispositive in an obviousness determination. *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573, 1579 (Fed. Cir. 1997) (emphasis added).

When the art in question is relatively simple, the opportunity to judge by hindsight is particularly tempting. Consequently, the tests of whether to combine references need to be applied rigorously. *McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1352 (Fed. Cir. 2001). In each case the factual inquiry whether to combine references must be thorough and searching. *Id.*, at 1352 - 53.

No Substantial Evidence of a Motivation to Modify or Combine

In summary, the purported motivations to combine and modify the disparate references are, at best, conclusory statements that the proposed combinations and modifications would have conferred an advantage. There is not even the allegation that the prior art demonstrates the desirability of combining or modifying the references.

The Examiner proposes the following motivation to combine West with Eraser:

"it would have been to [sic] eliminating the need for the manual collection of data transmission"

Office Action, page 4.

Whatever may be meant by "eliminating the need for the manual collection of data transmission", the prior art does not provide for this proposed motivation anywhere in the references of record, and in any event the proposed combination would not in any way benefit from eliminating "manual collection" of anything - neither West nor Eraser involves anything which is "manually collected". Accordingly, the prior art does not motivate the proposed combination of West with Eraser.

In addition, the Examiner proposes the following motivation to combine West and Eraser with Jones:

- "such modification would provide the teachings of West and Fraser with the enhanced [sic] necessary to ensure the accurate and timely settlement between consumer goods manufacturers and the retailers of their products"

Office Action, page 4.

Again, the prior art does not provide for this proposed motivation anywhere in the references of record, and in any event the proposed combination would not in any way benefit from additional "timely settlement". Accordingly, the prior art does not motivate the proposed combination of West, Fraser and Jones.

Accordingly, a prima facie case of obviousness has not been made for at least these reasons.

4.3. Nonanalogous References

Applicable Law

In order to rely on a reference as a basis for rejection of the applicant's invention, the reference must either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned. In re Oetiker, 977 F.2d 1443, 1447 (Fed. Cir. 1992).

Factual Findings

The Examiner has not provided any evidence relating to the problem, nor why the references are pertinent to the problem.

The Examiner has not provided any evidence relating to the field of endeavor, nor why the references are in the field of endeavor.

No Showing That References Are Reasonably Pertinent to Problem or in Field of Endeavor

Fraser is directed to a price comparison system.

West is directed to a coupon dispensing system.

Jones is directed to a system for recording and auditing transactions at the point-of-sale.

The Examiner does not at all describe how the disparate references can be considered in the field of endeavor or reasonably pertinent to the problems addressed. The Examiner has not indicated any facts which permit such conclusions to be made. The rejection fails for at least this reason.

None of the references have anything to do with, e.g., acquiring a customer for a manufacturer when the customer does not, ahead of time, intend to do business with that manufacturer.

4.4. Level of Skill

Applicable Law

A factual predicate underlying an obviousness determination is the level of ordinary skill in the art. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). The skill level is one component of the inquiry for a suggestion to combine. *In re Rouffet*, 149 F.3d 1350, 1359 (Fed. Cir. 1998).

Lacking a motivation to combine, there is no prima facie case of obviousness. *In re Rouffet*, 149 F.3d 1350, 1358 (Fed. Cir. 1998). If examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

Factual Findings

Though required to do so, the Examiner has not set forth any evidence relating to the level of ordinary skill in the art, and has not even alleged what the level of skill in the art would be. The rejection fails for at least this reason.

Based on the present record, one could only conclude that the level of skill is low. No reference cited by the Examiner even addresses any problems that are addressed by the present invention.

None of the references permit any acquisition of a customer for a manufacturer when the customer does not, ahead of time, intend to do business with that manufacturer. The prior art does not even recognize that this would be highly beneficial. In addition, the references generally show that the acquisition of new customers was not something which the art successfully addressed.

In conclusion, the Examiner has not set forth a *prima facie* case of obviousness of any independent claim. Accordingly, for at least those reasons, the independent claims and thus all remaining claims as well have not been shown to be unpatentable in view of the cited references.

CONCLUSION

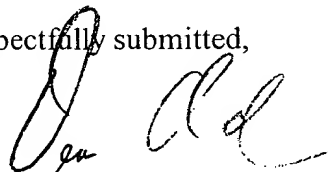
Thus, the Examiner's rejection of the pending claims are is improper at least because the references of record, alone or in combination, do not disclose or suggest all the limitations of any claim. In addition, in the obviousness rejections the Examiner has improperly combined the references because there is no adequate reasoning or support in the prior art for making the proposed combination. Therefore, Appellants respectfully request that the Examiner's rejections be reversed.

If any issues remain, or if there are any further suggestions for expediting allowance of the present application, please contact Dean Alderucci using the information provided below.

Appellants hereby request any extension of time that may be required to make this Appeal Brief timely. Please charge any fees that may be required for this paper, or credit any overpayment, to Deposit Account No. 50-0271.

February 17, 2004
Date

Respectfully submitted,



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APPENDIX A
CLEAN COPY OF CLAIMS INVOLVED IN THE APPEAL

Claims 17 - 26, 80, 86 and 87 are pending.

Claims 17, 80, 86 and 87 are independent.

17. A method for promoting a sale of a substitute product, comprising:
- receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;
- transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;
- upon receipt of information regarding a substitute product from said remote server, offering said substitute product to said consumer before the transaction session terminates;
- consummating a sale of said original product if at least one of
- (a) no information regarding said substitute product is received from said remote server, and
- (b) said consumer declines said offering; and
- consummating a sale of said substitute product upon acceptance by said consumer of said offering.

CLEAN COPY OF CLAIMS INVOLVED IN THE APPEAL

18. The method of claim 17 wherein said consummating a sale comprises removing transaction data regarding said original product from pending sale data and substituting transaction data regarding said substitute product in said pending sale data.
19. The method of claim 18 wherein said transaction data includes at least one of: product price, product identifier and product UPC code.
20. The method of claim 17 wherein said consummating a sale of said substitute product comprises adding transaction data regarding said original product to pending sale data after said consumer's rejection of said offering.
21. The method of claim 17 wherein said original and substitute products have different manufacturers.
22. The method of claim 17 wherein one manufacturer manufactures both said original product and said substitute product.
23. The method of claim 17 wherein said offering comprises transmitting information regarding said substitute product to said consumer via at least one of: a printer, a display terminal and a speaker.
24. The method of claim 17 further comprising transmitting to said server inventory information of a potential substitute of said original product.

CLEAN COPY OF CLAIMS INVOLVED IN THE APPEAL

25. The method of claim 17 further comprising transmitting additional information to said server for determination of said possible substitute product, said additional information comprising at least one of: product profit margin information, product inventory information, product expiration date information, retail product price information, product floor price information, product sales information, sale and promotional pricing information, product demand information, product forecast information, product class information, product pricing information, and information regarding product features.

26. The method of claim 17 further comprising transmitting information regarding a sale of said substitute product to said server.

80. An apparatus for promoting a sale of a substitute product, comprising:

means for receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;

means for transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;

means for transmitting an offer of said substitute product to said consumer before the transaction session terminates;

means for consummating a sale of said original product if at least one of (a) no information regarding said substitute product is received from said remote server, and (b) said consumer declines said offering; and

means for consummating a sale of said substitute product upon acceptance by said consumer of said offering.

86. Computer executable software code stored on a computer readable medium, the code comprising:

code for receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;

code for transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;

code for transmitting an offer of said substitute product to said consumer before the transaction session terminates;

code for consummating a sale of said original product if at least one of (a) no information regarding said substitute product is received from said remote server, and (b) said consumer declines said offering; and

code for consummating a sale of said substitute product upon acceptance by said consumer of said offering.

87. A computer readable medium having computer executable software code stored thereon,
the code comprising:

code for receiving transaction data regarding an original product presented for purchase
by a consumer at a point of sale terminal;

code for transmitting said transaction data to a remote server of a manufacturer during a
transaction session for determination of a possible substitute product to be offered to said
consumer;

code for offering said substitute product to said consumer before the transaction session
terminates;

code for consummating a sale of said original product if at least one of (a) no information
regarding said substitute product is received from said remote server, and (b) said consumer
declines said offering; and

code for consummating a sale of said substitute product upon acceptance by said
consumer of said offering.

APPENDIX B

INDEPENDENT CLAIMS INVOLVED IN THE APPEAL

Claims 17 - 26, 80, 86 and 87 are pending.

Claims 17, 80, 86 and 87 are independent.

17. A method for promoting a sale of a substitute product, comprising:
- receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;
- transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;
- upon receipt of information regarding a substitute product from said remote server, offering said substitute product to said consumer before the transaction session terminates;
- consummating a sale of said original product if at least one of
- (a) no information regarding said substitute product is received from said remote server, and
- (b) said consumer declines said offering; and
- consummating a sale of said substitute product upon acceptance by said consumer of said offering.

80. An apparatus for promoting a sale of a substitute product, comprising:

means for receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;

means for transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;

means for transmitting an offer of said substitute product to said consumer before the transaction session terminates;

means for consummating a sale of said original product if at least one of

(a) no information regarding said substitute product is received from said remote server, and

(b) said consumer declines said offering; and

means for consummating a sale of said substitute product upon acceptance by said consumer of said offering.

86. Computer executable software code stored on a computer readable medium, the code comprising:

code for receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;

code for transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;

code for transmitting an offer of said substitute product to said consumer before the transaction session terminates;

code for consummating a sale of said original product if at least one of

(a) no information regarding said substitute product is received from said remote server, and

(b) said consumer declines said offering; and

code for consummating a sale of said substitute product upon acceptance by said consumer of said offering.

INDEPENDENT CLAIMS

87. A computer readable medium having computer executable software code stored thereon, the code comprising:

code for receiving transaction data regarding an original product presented for purchase by a consumer at a point of sale terminal;

code for transmitting said transaction data to a remote server of a manufacturer during a transaction session for determination of a possible substitute product to be offered to said consumer;

code for offering said substitute product to said consumer before the transaction session terminates;

code for consummating a sale of said original product if at least one of

(a) no information regarding said substitute product is received from said remote server, and

(b) said consumer declines said offering; and

code for consummating a sale of said substitute product upon acceptance by said consumer of said offering.

INDEPENDENT CLAIMS